MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE CRIPPEN** on January 5, 1995, at 10:00 a.m.

ROLL CALL

Members Present:
Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary
Judy Feland, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing: SB 1, SB 10
Executive Action: SB 26

HEARING ON SB 1

[Tape 1, Side A]

Opening Statement by Sponsor:

SENATOR DELWYN GAGE, SD 43, Cut Bank, presented SB 1, which is "an act generally revising and clarifying the Montana Code Annotated: Directing the Code Commissioner to clarify erroneous references contained in material enacted by the 54th

Legislature." **SENATOR GAGE** explained that this code commissioner bill comes before the legislature each session and modifies parts of the law that have been preempted by court decisions and/or corrects errors that are not substantive in nature.

Proponents' Testimony:

Greg Petesch, Code Commissioner for the State of Montana, told the committee that the statute requires him to prepare a report and legislation to correct errors in the code. The procedure used to prepare this bill has been designed over time to prevent controversy. All proposed amendments have been sent in advance to the parties affected by the provisions.

Mr. Petesch highlighted the following provisions that appear to be substantive and explained why they were not:

*Local option gas tax in Section 8. Previously exempted from the transfer in collection of all fuel taxes from the Department of Revenue to the Department of Transportation, this clarifies that all fuel taxes are now collected by the Department of Revenue.

*Allocation of taxes in Section 10. In the section of the law that deals with oil severance tax collections, the law will be amended to read all amounts of collections rather than the remainder; there is no excess to be allocated.

*School special education law in Section 34. This deals with the removal of an emotionally disturbed child. The Department of Family Services pointed out that definition is never used in DFS law and should be removed. There is no provision in DFS laws that use that term. The Office of Public Instruction uses the same definition, but one that already exists and conforms to federal requirements and they preferred not to have this additional definition in the codes.

*Probate in Section 41. This is actually a presumption under the evidentiary provisions. During the last session the law was revised to read that a person was presumed dead after five years of not being heard from. The evidentiary presumptions contain a provision of seven years. These conformed before. It does not make sense to declare a person dead for one purpose but not another. This change conforms the presumption of death to a five year period for both probate and other evidentiary matters.

*Duties of Code Commissioner in Section 73. This section has been included in the last five sessions. This implements an existing section of the statute governing the duties of the code commissioner, that says when given the authority by another law, the code commissioner may correct erroneous references in law. If there is any doubt, the references are bracketed and brought back to the legislature the next time, he said. All changes are reported in the code commissioner report which is published in the annotations in the end.

Mr. Petesch said there was a section regarding notary publics to repeal because of the adoption of the uniform material acts bill last session. The other form is now archaic.

Mr. Petesch also said that there were several provisions referring to the governor's centennial mansion enacted as part of the centennial process, but the time is long past for the state to exercise its options so these statutes would repealed.

Mr. Petesch explained the repealing of the dangerous drug tax. This was declared unconstitutional by the Supreme Court on the basis of double jeopardy. This would normally not be done in a code commission bill and the committee would be allowed to amend it as they chose, because he said he knows of no way to undo a statute that's been acknowledged as a double jeopardy in a criminal provision even though it was civil in nature. It would be better to get it off the books and if anyone wanted to pursue a dangerous drug tax; to start anew. There is currently a bill request in to revise the dangerous drug tax and the sponsor thought it would be better to start with a new set of statutes rather than trying to undo the double jeopardy provision attached to this civil statute.

Another set of statutes the bill would repeal dealt with the retirement adjustment for state retirees. It was struck down when the legislature dealt with the ramifications of the tax treatment of federal retirees. They're being repealed rather than revised because the court said that they were invalid because the bill contained two subjects in violation of the single subject provision. **Mr. Petesch** said he knew of no way to remedy a bill to remove a subject after it's been passed.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SENATOR AL BISHOP inquired why did he change the non-probate to five instead of changing the probate to seven.

Mr. Petesch answered that the probate section was changed last session. This was an oversight.

SENATOR LORENTS GROSFIELD asked **Mr. Petesch** about the two-subject provision and inquired if it was normal for the supreme court to nullify both provisions.

Mr. Petesch said that this particular discussion had taken up much of the opinion in the case and there was a separability clause included in that bill because the legislature was aware of that potentially. The Supreme Court implemented the separability clause to strike the retirement adjustment because the tax

treatment was mandated for conformity with federal law. The court determined that this was the true purpose of the bill, and the retirement adjustment was an attempt to undo that tax treatment that was required in the first half of the bill for state retirees.

SENATOR MIKE HALLIGAN asked about the definition of an emotionally disturbed child, as used in special education status. He asked if it was nowhere else in the statute?

Mr. Petesch said that the definition is being retained in the special education statutes, but is being removed from the program under the Department of Family Services term where it is never used.

DISCUSSION:

CHAIRMAN CRIPPEN said he would be willing to appoint a sub-committee to go over these provisions with **Mr. Petesch** if any of the committee members wanted to satisfy themselves and the rest of the committee that the changes are appropriate and not taking away substantive rights.

Closing by Sponsor:

SENATOR GAGE, in closing on SB 10, remarked on the dangerous drug tax issue and wondered how the Internal Revenue Service could penalize or jail a person for fraud, when one is a civil case and the other is criminal. The courts don't have any problem with jailing for a criminal case, he said, but they do with this. He asked for a favorable consideration on the bill.

HEARING ON SB 10

Opening Statement by Sponsor:

SENATOR DELWYN GAGE, SD 43, Cut Bank, presented SB 10, an act entitled: An act granting the state the right to a jury trial in all felony and misdemeanor cases in all courts." **SENATOR GAGE** said the bill attempts to level the playing field with regard to court activity in jury trials.

Proponents' Testimony:

John Connor, representing the Montana County Attorneys' Association, spoke in support of the bill. This bill is a request from that association in response to a problem that arose from the decision of the Montana Supreme Court in 1993 called Nelson vs. Supreme Court. Then-County Attorney Nelson had prosecuted a felonious assault and obstruction of justice case in

which the defendant attempted to waive jury trial. Nelson objected to that; he wanted the matter heard before the jury but the district court ruled against him. That resulted in this original proceeding in the Supreme Court. In that case, the court concluded that Article 2, Section 26 of the Constitution guarantees to the defendant in criminal cases the right to be tried by a jury. The court also pointed out that the constitutional provision allows the legislature to provide a procedure by which there is a waiver of this right of trial by jury.

Prior to 1991 legislation in that regard provided that the waiver by trial by jury had to be by both parties. In the 1993 revisions to the criminal procedure statues, the law was changed from saying "parties" to read "defendant" has the right to waive trial. The court construed that provision in conjunction with the constitutional provision to say that the state could not insist on a right to trial by jury as long as the defendant was waiving that right.

This bill, he said, would attempt to put the language back where it was prior to 1991. The present law has worked hardship on prosecutors, he said. It would not infringe upon the right of a defendant and does not infringe upon his right to trial by jury. It tries to address the situation where the court may be disposed in a particular situation for a defense point of view and disallow the defendant the tactic of getting it before the court rather than a jury. Judges are disposed to a particular point of view.

This bill would allow the situation to be put before the people and let the jury decide the facts in the law. As the law is structured now, the state does not have a say in whether the jury is going to be waived. He asked the committee for support on SB 10.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SENATOR STEVE DOHERTY questioned what other states do in this regard.

Mr. Connor answered that there is a split of authority on it. California and Oklahoma require consent of the parties. Some jurisdictions say that the judge has to decide, some say the defendant has the choice. He did not think there was any consensus.

SENATOR DOHERTY said that prosecutors take the bias of a judge

into account when they draw the judge who's going to hear the case and are able to strike the judge. He asked why this would make an even playing field when the playing field is already even since anybody can strike the judge for no cause at all?

Mr. Connor replied that it would be possible for either side to disqualify a judge without showing a cause, but if you are operating in a small jurisdiction, where this problem arose, and are hearing a bias against a legal point of view, you cannot consistently disqualify that judge. It's not fair to other judges who are called in to sit on the case and not fair to the judge who's there. This law would put the question before the people to decide.

SENATOR DOHERTY asked about the importance of the jury system coming from the prosecutor's perspective that it's somewhat unusual to hear about a prosecutor who wants to get the case before the people instead of the judge.

Mr. Connor responded that what they are proposing in this bill is a rarity. Normally if the defendant wants to waive the jury trial, the state has no objection. He did an informal survey on how often this kind of thing would arise among two prosecutors and he said it's only arisen twice in many years. His wife, who is the Lewis and Clark County Public Defender, said it has never happened. He said that you would have 12 people deciding instead of one, that would be the difference in his opinion.

SENATOR SUE BARTLETT asked **Mr. Connor** if he could give other examples in which the state might request a jury trial when the defense waives it.

Mr. Connor gave an example from his own experience of a case from eastern Montana where he was prosecuting a teacher who was charged with child sex abuse involving a freshman girl. During the case, the judge made a comment along the lines of, "Oh, to be a sex offender again." **Mr. Connor** said he would not want to try that case before that judge without a jury panel because he had perceived a bias on his part and may not fairly judge the facts of that case.

SENATOR BARTLETT asked is there were other circumstances beyond the potential bias by the judge in which the state might want a jury trial and the defense might not?

Mr. Connor said that there may be some, but none would occur to him at the moment, and that's why he thought it would be so infrequently used.

SENATOR LARRY BAER was concerned that we would be taking away one of the defendant's rights by negating his choice of either trial by judge or jury should the prosecutor demand a trial by jury. He thought that while it was not a significant factor, it should have some weight in the determination.

Mr. Connor said that the Supreme Court points out that the defendant doesn't have a constitutional right to a non-jury trial, so it is by statute that the legislature decides how that should be operated. In this bill, he said, we're only trying to assure that the state has the same rights the defendant has.

SENATOR BAER disagreed with **Mr. Connor's** answer and said that we are diluting the power of the defendant whether he would have a jury trial or be tried by a judge and he thought it should be given consideration.

Mr. Connor agreed saying he thought it would be a tactical consideration.

CHAIRMAN CRIPPEN commented that the ability of the state to go to court and prove an individual's guilt has become much more efficient. The trial by jury was created because prior to that they didn't have the right to be heard before their peers, rather, they went before the magistrate. But never once, he said, has it been stated that the state shall also have the right to present its case before its peers. The state has no peers, he said. He said we seem to have confused the theory of getting out the truth which is ridiculous in a criminal case, and somewhat repugnant. Of the judge disqualification issue, he noted, it's the state that's bringing the charges, the defendant is the defense and is innocent on all counts until proven guilty. It's the state's responsibility. He said he could not understand why the state would have the right to a jury trial in a criminal case.

Mr. Connor responded that there was not that great a disparity between the defendant and the state. A prosecutor has to show testimony that will convince twelve people beyond a reasonable doubt and the defendant just has to convince one person that there is a reasonable doubt. He said that he liked to believe that a criminal trial is an effort to try to present the truth.

CHAIRMAN CRIPPEN added that he did not think disparity had much to do with it. The state has the burden of proof, he said, not truth.

Closing by Sponsor:

In closing, **SENATOR GAGE,** told the committee that if had not thought this bill was needed, he would not have agreed to carry the measure. He commented that everyone needs an equal shot and that the laws of the land are laws of the people and that prosecutors are representing the people of the state of Montana. They should have an equal opportunity as does the defendant to have their case heard.

EXECUTIVE ACTION ON SB 26

[Tape 1, Side B]

Discussion: **Valencia Lane, Staff Attorney,** explained the amendment requested by **SENATOR EVE FRANKLIN** she had drawn up on SB 26.

Motion/Vote: **SENATOR BISHOP MOVED THAT THE AMENDMENT BE ADOPTED.**

Discussion: **SENATOR DOHERTY** pointed out that the issue of telecommunication as it pertains to adults and youth in the amendment has not really been heard.

SENATOR HALLIGAN asked **Candy Wimmers** what happened to the juvenile audio-visual discussed in the interim?

Ms. Wimmers said she did not know, she thought they had intended to include it in the youth court act, but on checking, it was not.

SENATOR HALLIGAN expressed his concern about two subjects in this bill, and that it would be rejected on the floor.

Ms. Lane agreed that the amendments do expand the bill and discussed the MACO amendments, also reconsidering the bill.

SENATOR GROSFIELD wanted to know if we held another hearing were held, would that be sufficient to the court.

SENATOR HALLIGAN said that since **Ms. Lane** had drafted the amendment to actually change the title to include all issues, it would be covered.

SENATOR BAER agreed with **SENATORS HALLIGAN** and **DOHERTY** and **Ms. Lane.** He would like more time to consider the bill particularly in the areas of costs of equipment and continuing costs. He preferred to separate those issues.

CHAIRMAN CRIPPEN asked **Mr. Gordon Morris, MACO,** if **SENATORS KEATING** and **JOHNSON** had withdrawn their requests. He said they had cancelled.

SENATOR HALLIGAN expressed his wish to keep this bill in this committee. He encouraged a vote for the amendment.

SENATOR BARTLETT said that if the committee amends the bill procedurally then it would need to ask for a gray bill because traditionally the amendments would not appear in the body of the bill until the second reading.

Ms. Lane said she would do that.

CHAIRMAN CRIPPEN recommended adoption of the amendment and a re-scheduling of the hearing for January 9th.

Vote: The **MOTION CARRIED UNANIMOUSLY** on oral vote.

ADJOURNMENT

Adjournment: The meeting adjourned at 11:07 a.m.

BRUCE CRIPPEN, Chair

JUDY FELAND, Secretary

BC/jf

1

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 1-5-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

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DATE 01-05-95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB1, SB 10

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Check One

Name	Representing	Bill No.	Support	Oppose
Greg Petesch	Leg. Council	SB1		
John Connot	MT. County Atty Assn	SB10	X	
JOE ROBERTS	Mt. Cty Atty's Assoc	SB10	x	
MICHAEL KEEDY	MJBA			

VISITOR REGISTER

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